

**REMARKS**

**I. STATUS OF CLAIMS**

Claims 1 and 3-44 are pending. Claims 20-28 and 41-44 are withdrawn from consideration. No claim is amended herein.

**II. REJECTION UNDER 35 U.S.C. § 112**

Claims 1, 3-19, and 29-40 are rejected under 35 U.S.C. § 112, first paragraph, as allegedly failing to comply with the written description requirement. Office Action at page 2. The Examiner asserts that “[t]here is no support in the specification for the recitation ‘wherein the conditioning agent is present in an amount from 0.05 to 4% by weight relative to the total weight of the composition.’” *Id.* at page 3. Applicants respectfully disagree. As pointed out in the Amendment and Reply to Office Action filed on February 4, 2008, page 6, lines 8-10 of the specification provides support for the recitation previously added to claims 1 and 38. Specifically, at page 6, lines 8-10, the specification states, “The composition advantageously comprises, as a relative percentage by weight of the composition, from 0.01 to 16% of conditioning agent and preferably from 0.05 to 4%.” (emphasis added). Thus, despite the Examiner’s contentions, there is explicit written description support for the recitation “wherein the conditioning agent is present in an amount from 0.05 to 4% by weight relative to the total weight of the composition,” in the specification, as filed. It is not clear why the Examiner continues to disagree with the literal support provided in the specification. Accordingly, Applicants respectfully request that the Examiner reconsider and withdraw the rejection.

### III. REJECTION UNDER 35 U.S.C. § 103

#### A. Rejection of Claims 1, 3-19, and 29-32

Claims 1, 3-19, and 29-32 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable based on U.S. Patent No. 4,150,216 to Quack et al. ("Quack") in view of U.S. Patent No. 5,164,177 to Bhatt et al. ("Bhatt"). Office Action at page 3. The Examiner acknowledges that Quack does not teach the claimed cationic and/or amphoteric polymers as conditioning agents, and she turns to Bhatt to remedy this deficiency. *Id.* at page 4. The Examiner asserts that Bhatt teaches "hair compositions which includes from about 0.1% to about 10%, and preferably from about 1.0% to about 5.0%, by weight of a non-volatile silicone compound or other conditioning agent(s), preferably a water-insoluble emulsifiable conditioning agent. *Id.* The Examiner asserts that:

It would have been obvious to one of ordinary skill in the art at the time of the invention to incorporate the non-volatile silicone in the hair composition. The motivation is from the teachings of Bhatt et al. that the non-volatile silicone provides improved combing and improved feel (softness) to the hair after shampooing. Hence a skilled artisan would have reasonable expectation of successfully producing a composition with the same efficacy and results.

See *id.* Applicants respectfully disagree and traverse the rejection for at least the following reasons.

The Examiner bears the initial burden of factually supporting any *prima facie* conclusion of obviousness. M.P.E.P. § 2142. In *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 U.S.P.Q. 2d 1385 (2007), the Supreme Court confirmed that the "framework for applying the statutory language of §103" was still based on its landmark

decision in *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 148 U.S.P.Q. 459 (1966). Under *Graham*, there are four factors for consideration when determining whether an invention is obvious:

- (1) the scope and content of the prior art;
- (2) the differences between the prior art and the claims at issue;
- (3) the level of ordinary skill in the art; and
- (4) secondary considerations.

383 U.S. at 17, 148 U.S.P.Q. at 467. The obviousness or non-obviousness of the claimed invention is then evaluated in view of the results of these inquiries. *Graham*, 383 U.S. at 17-18, 148 U.S.P.Q. 467; see also *KSR Int'l Co. v. Teleflex, Inc.*, 127 S. Ct. at 1734, 82 U.S.P.Q. 2d at 1388.

To rebut an obviousness rejection, an Applicant may submit evidence that the claimed invention provides benefits or results that would have been unexpected to one of ordinary skill in the art. See M.P.E.P. § 716.02. Comparative test data presented in the specification is sufficient to rebut a *prima facie* case of obviousness. See *id.* at § 2145. Applicants submit that the Examples in the specification show that the claimed invention possesses unexpectedly improved properties or properties that the prior art does not have. See *id.* at § 716.02(a). Thus, Applicants submit that Example 1 on pages 11-12 of the specification demonstrates the unexpected superiority of the claimed cosmetic compositions.

In Example 1, three compositions were prepared. Compositions 1 and 2 (invention) included a branched sulphonic polyester (AQ 1350) and a conditioning agent present in an amount ranging from 0.05 to 4% by weight relative to the total weight of

the composition. The comparative composition, Composition 3 (prior art) included only a branched sulphonic polyester and no conditioning agent, which is similar to the composition disclosed in Quack which may include additional additives, but does not necessarily contain a conditioning agent.

Flexible heads were provided for testing. The compositions were applied in a half-head manner, i.e., to the right or left side of the head of hair, separated by a strip in the middle. Three grams of each composition, Compositions 1, 2, and 3, were applied per half-head. The flexible heads were blow-dried, styled at 21°C and at 30% relative humidity and were left to stand for 10 minutes under these same temperature and humidity conditions.

The performance characteristics obtained were measured by means of a sensory test. The performance characteristics were graded between 0 (poor) and 5 (excellent). The results are reported in Table 1 on page 12 of the specification, which is reproduced below for the Examiner's convenience.

**Table 1**

Comparative —	Composition 1/Composition 3	Composition 2/Composition 3
DISENTANGLING	4.5 / 3.5	5.0 / 2.0
BODY	1.5 / 0.5	1.5 / 0.5
SOFTNESS	4.0 / 2.5	3.5 / 1.5
FEEL	4.0 / 2.0	4.0 / 1.0
STYLING POWER	4.0 / 2.0	4.5 / 3.5
RETYLING POWER	4.0 / 0.0	4.0 / 1.0

As shown from the results provided in Table 1 above, it was observed that the performance characteristics obtained with inventive Compositions 1 and 2, for example, disentangling, body, softness, feel, styling power, and restyling power, were unexpectedly superior as compared with comparative Composition 3. Thus, based on the experimental data, a composition comprising at least one branched sulphonic polyester and at least one conditioning agent chosen from non-volatile silicones, cationic and amphoteric polymers and cationic and amphiphilic surfactants, wherein the conditioning agent is present in an amount ranging from 0.05% to 4% by weight relative to the total weight of the composition, is unexpectedly superior as compared with a composition comprising only a branched sulphonic polyester, such as comparative Composition (3).

For at least the foregoing reasons, Applicants submit that the evidence presented above is sufficient to rebut the obviousness rejection over Quack in view of Bhatt. Accordingly, Applicants respectfully request that the Examiner reconsider and withdraw the rejection.

**B. Rejection of Claims 33-40**

Claims 33-40 are rejected under 35 U.S.C. § 103(a) as allegedly being unpatentable over Quack and Bhatt, as applied to claims 1, 3-19, and 29-32 above, and further in view of U.S. Patent No. 5,320,836 to Singleton et al. ("Singleton"). Office Action at page 4. The Examiner acknowledges that Quack and Bhatt fail to disclose Applicants' claimed propellant, and uses Singleton to remedy this deficiency. *Id.* at page 5. The Examiner asserts that Singleton teaches aerosol hair care compositions containing conventional propellants such as aliphatic hydrocarbons and dimethyl ether.

*Id.* The Examiner asserts that Quack discloses sprayable hair compositions, therefore one of ordinary skill in the art would have been motivated to use the propellants disclosed in Singleton in the sprayable hair compositions disclosed in Quack with a reasonable expectation of success. *See id.*

Applicants submit that the evidence provided at pages 11-12 of the specification, which is discussed in Section III.A. above is sufficient to rebut the obviousness rejection over Quack in view of Bhatt, and further in view of Singleton. Accordingly, Applicants respectfully request that the Examiner reconsider and withdraw the rejection.

#### **IV. DOUBLE PATENTING REJECTIONS**

The Examiner sets forth four obviousness-type double patenting rejections:

1. Claims 1, 3-19, and 29-40 are rejected for obviousness-type double patenting as allegedly being unpatentable over claims 1, 14-24, 26-27, and 29 of U.S. Patent No. 6,039,933 ("the '933 patent").
2. Claims 1, 3-19, and 29-40 are rejected for obviousness-type double patenting as allegedly being unpatentable over claims 1-22 of U.S. Patent No. 6,692,730 ("the '730 patent").
3. Claims 1, 3-19, and 29-40 are rejected for obviousness-type double patenting as allegedly being unpatentable over claims 1-19 of U.S. Application No. 10/320,707 ("the '707 application").
4. Claims 1, 3-19, and 29-40 are rejected for obviousness-type double patenting as allegedly being unpatentable over claims 1-30 of U.S. Application No. 11/030,296 ("the '296 application").

Office Action at pages 6, 7, and 8. The Examiner made the same rejections based on the same patents and applications, virtually verbatim in the Office Action mailed October 4, 2007. Applicants traversed this rejection, however, the Examiner has failed to respond to Applicants' arguments submitted in the Amendment and Reply filed February 4, 2008, or provide any reason why the traversal was not sufficient to

overcome the rejections. Applicants continue to traverse each of the foregoing rejections for at least the reasons of record, and for the reasons discussed herein.

Applicants maintain that none of the claims in the '933 patent, the '730 patent, the '707 application, or the '296 application are directed to a composition comprising at least one branched sulphonic polyester and at least one conditioning agent chosen from non-volatile silicones, cationic and amphoteric polymers, and cationic and amphiphilic surfactants, especially where the conditioning agent is in an amount ranging from 0.05 to 4% by weight relative to the total weight of the composition. The Examiner continues to assert that the compositions are "similar," however, as previously pointed out similarity of two compositions is not enough to establish obviousness.

In addition, an obviousness rejection cannot be sustained by mere conclusory statements; instead there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness. *KSR Int'l Co. v. Teleflex Inc.*, 127 S. Ct. 1727, 82 U.S.P.Q. 2d 1385 (2007) (emphasis added). As in the previous Office Action dated October 4, 2007, the Examiner fails to provide an articulated reasoning as to why a person of ordinary skill in the art would modify the invention recited in the claims of the '933 patent, the '730 patent, the '707 application, or the '296 application to arrive at Applicant's claimed composition. Accordingly, the Examiner has failed to establish that claims 1, 3-20 and 29-40 are obvious based on any of the claims of the '933 patent, the '730 patent, the '707 application, or the '296 application.

In view of the foregoing, Applicants respectfully request that the Examiner reconsider and withdraw each of the foregoing rejections. If the Examiner is not

persuaded to withdraw the rejections, Applicants respectfully request that the Examiner respond to Applicants arguments submitted herein and specifically point out why the Examiner is not persuaded to withdraw the rejections based on these arguments.

In view of the foregoing, Applicants respectfully request that the Examiner reconsider and withdraw each of the foregoing rejections.

#### IV. CONCLUSION

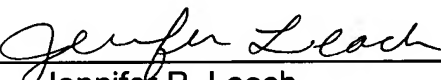
In view of the foregoing amendments and remarks, Applicants respectfully request reconsideration of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to Deposit Account No. 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.

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By:   
Jennifer R. Leach  
Reg. No. 54,257